

Second, the court holds that Defendants “likely ha[ve] the statutory authority to issue a vaccine requirement for Head Start program staff, contractors, and volunteers” because they have authority under 42 U.S.C. 9836a(a)(1)(A) & (E), which the Court describes as a “broad grant of authority.” *Id.* at *2. But Defendants pointedly do not rely on subsection (A) in promulgating the Final Rule, as the Court has already explained. *See* Dkt. #42 at 19–20. The Sixth Circuit should not have considered that subsection. And the grant of rulemaking authority is specific, not broad, as the Court has also already explained. *See* Dkt. #42 at 13.

Third, the Sixth Circuit accepted Defendants’ suggestion that statutory authority for the Interim Final Rule may be found by working backwards from the definition of “deficiency.” *Id.* But the power to issue deficiencies to Head Start programs that violate rules does not expand the power to adopt rules in the first place. Moreover, Head Start did not rely on the definition of “deficiency” in adopting the Interim Final Rule. Finally, while every violation of a program performance standard is a deficiency, not every deficiency is a violation of a program performance standard, so the definition of “deficiency” does not inform the meaning of “program performance standard” and does not justify any rule that purports to be a modification of program performance standards. *See* Dkt. #61 at 11–12, #64 at 1–2; #42 at 20–21.

Fourth, the court holds that Head Start’s supposed “history of regulating the health of Head Start children and staff provides further evidence that the vaccine requirement does not exceed the agency’s statutory authority.” *Id.* But there is no such history. *See* Dkt. #54–1 at 26–30; Dkt. #42 at 1, 20 (“[T]he Department of Health and Human Services created two unprecedented conditions on funding for Head Start programs ... [D]efendants concede that the Rule at issue is

the first time in Head Start's history that a health procedure was mandated as a prerequisite to participation or employment."").

Additionally, the Sixth Circuit did not consider whether Defendants adopted the Interim Final Rule without complying with 42 U.S.C. 9836a(a)(2), the Congressional Review Act, of the Treasury and General Appropriation Act of 1999. It also did not consider whether the rule is arbitrary and capricious or whether it violates the Constitution. Those are all additional reasons that the Interim Final Rule must be set aside. *See* Dkt. 54-1 at 31-34, 37-45.

Therefore, the Sixth Circuit's opinion does not change the correct result in this case. The Court should grant Plaintiffs' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically
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